Nos. 97-826, 97-829, 97-830, 97-831, 97-1075,
97-1087, 97-1099 and 97-1141

Supreme Court, U.S.
FILED
OCT 6 1998
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1998

AT&T Corp., *et al.*,

*Petitioners,*

*vs.*

Iowa Utilities Board, *et al.*,

*Respondents,*

And Related Cases.

*On Writ of Certiorari to the*
*United States Court of Appeals for the Eighth Circuit*

## MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF COVAD COMMUNICATIONS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

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## MOTION OF *AMICUS CURIAE* COVAD COMMUNICATIONS COMPANY FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

*Amicus curiae* Covad Communications Company ("Covad") respectfully moves the Court for leave to file the accompanying supplemental brief. In support of this motion, Covad states as follows:

1. Covad is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, digital telecommunications services. Covad has created its network by leasing local loops, which are Unbundled Network Elements ("UNEs"), from Incumbent Local Exchange Carriers ("ILECs") and combining them with Digital Subscriber Line ("DSL") equipment. Many customers use Covad's advanced network to transport telecommunications traffic between the subscriber's premises and the subscriber's Internet Service Provider ("ISP").

2. On April 3, 1998 Covad, with the consent of the parties, filed a brief *amicus curiae* in support of petitioners Federal Communications Commission ("FCC") and the United States of America.* In its brief, Covad demonstrated that a significant portion of the traffic carried over its UNE-based network is jurisdictionally interstate. Covad therefore concluded that the Eighth Circuit erred when it held that the FCC lacks authority to establish a pricing methodology for UNEs because these facilities are "fundamentally intrastate in character."

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* *See* Brief of *Amicus Curiae* Covad Communications Company in Support of Petitioners Federal Communications Commission and the United States of America, *AT&T Corp. v. Iowa Utilities Bd.* (U.S. Apr. 2, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1411).

3. In the seven months since Covad filed its initial brief, two developments — one originating in the Eighth Circuit, the other from the ILECs — have occurred. These developments provide significant support for Covad's position.

4. First, on August 19, 1998, the Eighth Circuit — in an opinion by the same panel that authored the decision below — held that telecommunications traffic between subscribers and their ISPs is jurisdictionally mixed and cannot be separated into interstate and intrastate components. *See Southwestern Bell Telephone Company v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998). Because Internet traffic constitutes a significant portion of the traffic carried over CLECs' UNE-based networks, this decision demonstrates that UNEs are not "fundamentally intrastate in character."

5. Second, in recent months, four major Incumbent Local Exchange Carriers (Bell Atlantic, BellSouth, GTE, and Pacific Bell) have voluntarily filed tariffs with the FCC for their new Digital Subscriber Line services, which are used primarily to transport local telecommunications traffic between subscribers and their ISPs. By filings these tariffs at the FCC, rather than with the state public utility commissions, the ILECs have recognized that a significant portion of the traffic carried over physically local telecommunications networks is jurisdictionally interstate.

6. As a Competitive Local Exchange Carrier that uses Unbundled Network Elements to provide Digital Subscriber Line service that enables small businesses and residential subscribers to have high-speed access to the Internet and other multi-state networks, Covad is able to provide this Court with a perspective on these new developments that, to the best of the Company's knowledge, will not be provided by any of the parties.

For the foregoing reasons, *amicus curiae* Covad Communications Company requests that the Court grant it leave to file this supplemental brief.

Respectfully submitted,

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## SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* COVAD COMMUNICATIONS COMPANY

*Amicus curiae* Covad Communications Company ("Covad") respectfully submits this supplemental brief.[1]

## INTERESTS OF THE *AMICUS CURIAE*

Covad is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, digital telecommunications services. Covad has created its network by leasing local loops, which are Unbundled Network Elements ("UNEs"), from Incumbent Local Exchange Carriers ("ILECs") and combining them with Digital Subscriber Line ("DSL") equipment. Covad's advanced telecommunications network is used by small businesses and residential subscribers who seek affordable, high-speed access to the Internet in order to access information stored in computer servers anywhere in the world. The Covad telecommunications network also is used by employees who work at home and connect to their company's multi-state and multi-national computer networks.

## INTRODUCTION

The decision below stripped the Federal Communications Commission ("FCC") of the express rulemaking authority granted by Congress, pursuant to which the agency established the pricing methodology for Unbundled Network Elements.[2] The court did

1. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

2. Section 251(c)(3) of the Communications Act requires that UNE rates be "just, reasonable, and nondiscriminatory in accordance with the . . . requirements of this section and section 252." 47 U.S.C. § 251(c)(3). Section 251(d)(1), in turn, directs that the FCC is to adopt rules "necessary . . . to implement the requirements of this section." *Id.* at § 251(d)(1). Taken together, these provisions expressly grant the FCC rulemaking authority to promulgate a binding national methodology to guide the States in their adjudicative determination regarding UNE rates.

so because it assumed that UNEs are "fundamentally intrastate in character." As a result, each State is now exercising exclusive and unfettered authority to establish UNE prices. This decision has had an adverse impact on CLECs, such as Covad, that rely on UNEs to provide service.[3]

In its initial brief,[4] Covad demonstrated that the Court's decision is based on two fundamental errors. The court's initial mistake was to assume that UNEs are "fundamentally intrastate in character" because they are used almost exclusively to provide *intrastate* telecommunications service.[5] This is simply wrong. UNE-based networks often are used to provide jurisdictionally *interstate* service. For example, these networks increasingly transport telecommunications traffic between a subscriber and his or her ISP. The ISP, in turn, sends the traffic on to computer servers, which often are located outside the subscriber's home State.[6] The court compounded its mistake by holding that, even if UNEs are "sometimes" used to provide interstate service, the States have the exclusive and unfettered

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3. Some States have still not established UNE rates. Other States have set these rates at levels that appear to be substantially in excess of cost.

4. On April 3, 1998, Covad, with the consent of the parties, filed an *amicus* brief in this matter (the "Covad *Amicus* Brief"). *See* Brief of *Amicus Curiae* Covad Communications Company in Support of Petitioners Federal Communications Commission and the United States of America, *AT&T Corp. v. Iowa Utilities Bd.* (U.S. Apr. 2, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1411).

5. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 796-99 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3484 (U.S. Jan. 26, 1998).

6. Covad *Amicus* Brief at 16-19.

right to set prices for those facilities.[7] This conflicts with well-established precedent. Because UNEs may be used to provide jurisdictionally interstate service, the FCC may regulate UNEs to the extent of their interstate use.[8]

## SUMMARY OF ARGUMENT

In the seven months since Covad filed its brief, two significant developments — one originating from the Eighth Circuit, the other from the ILECs — have occurred. These developments relate to the use of the local telecommunications network to transport traffic between subscribers and their Internet Service Providers.

- First, on August 19, 1998, the United States Court of Appeals for the Eighth Circuit — in an opinion by the very same panel that authored the decision below – held that traffic between subscribers and their ISPs is jurisdictionally mixed, and that it is not feasible to separate this traffic into interstate and intrastate components. *See Southwestern Bell Telephone Company v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998).

- Second, in recent months, four major Incumbent Local Exchange Carriers – Bell Atlantic, BellSouth, GTE, and Pacific Bell – have voluntarily filed tariffs with the FCC for their Digital Subscriber Line service. This service is used to transport traffic between subscribers and their ISPs. The ILECs stated that Federal tariffing is appropriate because, "at a minimum, a large portion of [this] traffic is interstate."

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7. *Iowa Utilities Bd. v. FCC*, 120 F.3d at 799.

8. Covad *Amicus* Brief at 19-24.

These developments demonstrate a clear recognition — by the court below and by the ILECs — that a significant, and rapidly growing, portion of the traffic carried over local telecommunications networks is jurisdictionally interstate. This is true for both ILEC and CLEC networks. Consequently, the court below erred when it assumed that the UNEs that CLECs use to provide service are "fundamentally intrastate in character." Because this assumption provided the basis for the court's conclusion that the FCC lacks authority to adopt a UNE pricing methodology, that decision must be reversed.

## I.

## THE EIGHTH CIRCUIT'S RECENT RECOGNITION THAT INTERNET TRAFFIC CARRIED ON LOCAL NETWORKS IS JURISDICTIONALLY MIXED DEMONSTRATES THAT THE LOCAL NETWORK FACILITIES THAT CLECs USE TO PROVIDE SERVICE ARE NOT "FUNDAMENTALLY INTRASTATE IN CHARACTER."

In its initial brief, Covad demonstrated that, in the decision below, the court focused on only one category of traffic carried over local telecommunications networks: traditional voice telephone calls.[9] As a result, the court assumed that the vast majority of *all* traffic carried over local telecommunications networks is jurisdictionally intrastate. The court further assumed that regulation of this traffic could readily be separated into interstate and intrastate components.[10] Based on these assumptions, the court concluded that the FCC lacks any authority to adopt a pricing methodology for Unbundled Network Elements, which are the local network facilities that CLECs use to transport telecommunications traffic.[11]

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9. *Id.* at 16-19.

10. *See id.*

11. *See id.* at 19-24.

In the subsequent *Southwestern Bell* case, however, the same panel was required to consider the jurisdictional nature of a different — and rapidly growing — category of traffic carried over local networks: data communications between a subscriber and the subscriber's ISP. The court, quite properly, recognized that this data traffic is jurisdictionally mixed, and that it cannot feasibly be separated into interstate and intrastate components.

The specific issue before the court in *Southwestern Bell* was whether the FCC had properly exercised its authority when it required incumbent local exchange carriers to recover the cost of transporting traffic between subscribers and their ISPs using a combination of Federal and State charges. The court upheld the FCC's action.

In reaching this conclusion, the court observed that:

> [T]he services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See People of State of California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Consequently, the FCC has determined that the [local telecommunications] facilties used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate . . . the Commission has appropriately exercised its discretion to require ISPs [to compensate the ILECs through a combination of Federal and State charges].

*Southwestern Bell Telephone*, slip op. at 41. The court went on to note, with apparent approval, that the FCC is considering the imposition of "additional [Federal] regulation" of this physically local traffic "under a scheme yet to be determined." *Id.* at 42.

The Eighth Circuit's belated recognition that communications between subscribers and their ISPs are jurisdictionally mixed requires reversal of the decision below. There is wide-spread agreement that communications between subscribers and their ISPs now constitutes a substantial — and growing — portion of the traffic carried over local telecommunications networks. Indeed, such communications account for the vast majority of traffic that Covad transports on its UNE-based network. Because a significant amount of traffic carried over CLECs' UNE-based networks is jurisdictionally interstate, the Eighth Circuit plainly erred when it assumed that UNEs are "fundamentally intrastate in character."

As Covad demonstrated in its initial brief,[12] under well-established jurisdictional principles, the FCC has the authority to regulate local telecommunications network facilties used to transport jurisdictionally mixed telecommunications traffic "to the extent of their interstate use." *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). Given the Eighth Circuit's recognition that traffic between subscribers and their ISPs is jurisdictionally mixed, the FCC — at a minimum — may regulate UNEs used to transport this traffic "to the extent of their interstate use." Indeed, given the Eighth Circuit's further finding that the FCC cannot separate the traffic between a subscriber and the subscriber's ISP into discrete interstate and intrastate components, the FCC may assert exclusive Federal authority

12. Covad *Amicus* Brief at 19-24.

over UNEs used to transport such traffic. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986) (FCC can preempt State regulation when it is "not possible to separate the interstate and intrastate components of . . . [an] FCC regulation.").

## II.

## THE ILECs' RECENT FCC TARIFF FILINGS RECOGNIZE THAT, AS A RESULT OF THE GROWTH OF THE INTERNET, A SIGNIFICANT PORTION OF THE TRAFFIC CARRIED OVER LOCAL TELECOMMUNICATIONS NETWORKS IS JURISDICTIONALLY INTERSTATE.

In the months since Covad filed its initial brief, four major Incumbent Local Exchange Carriers — Bell Atlantic, BellSouth, GTE, and Pacific Bell — have filed tariffs at the Federal Communications Commission for their new Digital Subscriber Line services.[13] The ILECs are deploying DSL service in order

13. *See* GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148 (May 15, 1998); Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986 (June 15, 1998); BellSouth Telecommunications, Inc., BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476 (Aug. 18, 1998); Bell Atlantic Telephone Companies, Bell Atlantic Tariff FCC No. 1, Bell Atlantic Transmittal No. 1076 (Sept. 1, 1998). After suspending each tariff for one day, the FCC allowed the tariffs to go into effect. The FCC is now conducting an investigation of the jurisdictional issues raised by each of these tariffs. *See GTE Telephone Operating Companies, GTOC Transmittal No.1148*, Order Designating Issues for Investigation, CC Docket No. 98-79 (Com. Car. Bur. Aug. 20, 1998); *Pacific Bell Telephone Company, Pacific Bell Transmittal No. 1986*, Order Designating Issues for Investigation, CC Docket 98-103 (Com. Car. Bur. Sept. 2, 1998); *BellSouth Telecommunications, Inc.*,

(Cont'd)

to respond to the significant increase in ISP-bound traffic on their local networks.[14]

The ILECs' decision to file DSL tariffs at the FCC constitutes a significant departure from their established practice. The ILECs customarily have recovered most of the cost of carrying traditional voice traffic through tariffs filed with the State public utilities commissions. The ILECs, however, correctly recognize that ISP-bound traffic differs fundamentally from voice traffic. They have stated that Federal tariffing is appropriate because, while ISP-bound traffic cannot be separated into interstate and intrastate components,[15] "at a

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(Cont'd)
*BellSouth Transmittal No. 476*, Order Designating Issues for Investigation, CC Docket No. 98-161 (Com. Car. Bur. Sept. 1, 1998); *Bell Atlantic Telephone Companies, Bell Atlantic Transmittal No. 1076*, Order Suspending Tariff and Designating Issues for Investigation, CC Docket No. 98-168 (Com. Car. Bur. Sept. 15, 1998).

14. The ILECs claim that, as a result of the phenomenal growth of the Internet, this traffic has created significant network congestion. DSL service is designed to address that problem by diverting ISP-bound traffic off the ILECs' circuit-switched networks and on to packet networks. *See, e.g.*, GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148, Description and Justification, at 1-2. *See generally* Covad *Amicus* Brief at 3-4 (describing the operation of DSL service).

15. *See, e.g.*, Direct Case of Pacific Bell, CC Docket No. 98-103, at 10-11 (Sept. 11, 1998) ("Although ISP traffic clearly involved interstate communications, Pacific is unaware of any technical way to determine the physical location of a destination point on the Internet. Internet addresses are assigned logically, not geographically like telephone numbers. . . . It is thus simply not possible to determine whether a communication is intrastate or interstate when the destination point is unknown." Moreover, a customer that uses DSL to access his or (Cont'd)

minimum, a large portion of [this] traffic" is jurisdictionally interstate.[16]

Like the ILECs, Covad has deployed DSL service to accommodate ISP-bound traffic. And, like the ILECs, Covad has determined that, at a minimum, a large portion of this traffic is jurisdictionally interstate. The Eighth Circuit's decision, however, has stripped the FCC of authority to establish the pricing methodology for the Unbundled Network Elements that CLECs such as Covad use to provide DSL service. This has divested the FCC of its authority to regulate facilties used to provide a jurisdictionally interstate telecommunications service. As Covad demonstrated in its initial brief, the Communications Act neither permits — much less requires — such a result.

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(Cont'd)
her Internet Service Provider "may communicate simultaneously with multiple destinations around the world. . . . It is not possible to separate the intrastate and interstate portions [of the DSL service when the customer] is simultaneously engaged in intrastate and interstate communications over the Internet.").

16. *See, e.g.*, Direct Case of GTE, CC Docket No. 98-79, at 15-16 (Sept. 8, 1998) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 830-49 (E.D. Pa. 1998), *aff'd*, 117 S. Ct. 2329 (1997)) ("The overwhelming weight of authority confirms that, at a minimum, a large portion of the Internet traffic carried over [Digital Subscriber Line services] is interstate in nature. The Internet is a 'global medium of communications' that 'links people, institutions, corporations, and governments around the world.' ").

## CONCLUSION

For the foregoing reasons, and those contained in Covad's initial brief, the Court should reverse the decision of the Eighth Circuit insofar as it holds that the FCC may not establish the pricing methodology that the States must apply to set UNE prices. At a minimum, the Court should make clear that the FCC may mandate the application of its pricing methodology when UNEs are used to provide jurisdictionally interstate telecommunications services.

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